

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
MIDDLE DIVISION

**FILED**

OCT 15 2009

Tennessee Claims Commission  
CLERK'S OFFICE

TRACY ZIEGLER, Individually, and )  
on behalf of JOSHUA ALAN )  
ZIEGLER, a Minor, )

Claimant,

vs.

Claim No. T20061350

Regular Docket

STATE OF TENNESSEE,

Defendant.

COMPUTER  
DOCKETED  
C/S-COMM  
DCA  
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ALJ  
FEE PAID  
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FILED

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

This is a wrongful death and personal injury claim brought by claimant, Tracy Ziegler, arising from a tragic car accident involving his wife, Marcy Ziegler, and their three minor children and Johnny A. Harris, a correctional officer with the Tennessee Department of Correction ("TDOC"), employed at the Riverbend Maximum Security Institution.

The parties have filed cross-motions for summary judgment.

Claimant renews his motion for partial summary judgment on the issue of liability,<sup>1</sup> arguing that Mr. Harris was acting in the course of his

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<sup>1</sup> Claimant's motion was denied by Order of July 9, 2008.

employment with the TDOC at the time of the accident and that application of the doctrine of *res ipsa loquitur* shifts the burden of proof to defendant to demonstrate that Mr. Harris was not negligent with respect to the accident. In support of its motion, the State argues that Mr. Harris was not acting in the scope of his employment at the time the accident occurred and that claimant cannot show that Harris was negligent in the operation of his motor vehicle.

Because the Commission concludes that the undisputed material facts demonstrate that Mr. Harris was not acting in the course of his employment with the TDOC at the time of the accident, summary judgment is entered for the defendant.

#### **FACTUAL BACKGROUND**

The following facts are undisputed for the purpose of this motion, unless otherwise noted. The claimant, Tracy Alan Ziegler is the surviving spouse of Marcy L. Ziegler and the father of Joshua Alan Ziegler, a minor, and Kassie Marie Ziegler and Devon Lee Ziegler, deceased minors.

On October 6, 2005, Marcy Ziegler and her three children were traveling west on I-24 near Manchester, Tennessee, when Johnny A.

Harris, who was driving east on I-24, left his lane of travel, crossed the median and collided with the Ziegler vehicle. Mr. Harris died in the accident, as did Mrs. Ziegler and two of her children, Kassie and Devon Ziegler. Joshua Ziegler survived the accident with personal injuries.

It is not known what caused Mr. Harris to leave his lane of travel and cross the median. Assistant Medical Examiner Thomas Deering, M.D., performed an autopsy on Mr. Harris's body following the accident. Dr. Deering concluded that the cause of death was multiple blunt force injuries and that the manner of death was accident. Although Dr. Deering determined that Mr. Harris's markedly enlarged heart, 90% stenosis of a coronary artery, and thickened left ventricle put him at increased risk of a heart attack, he was unable to determine whether his severe coronary disease contributed to the accident. Dr. Deering testified that nothing revealed in the autopsy made it anymore likely that Mr. Harris had suffered a heart attack than it was that he had fallen asleep or reached under the dash to pick up a dropped pair of glasses.

At the time of the accident, Mr. Harris was in his personal vehicle traveling from his home to the fourth day of an annual four-day training

session at the Tennessee Correction Academy in Tullahoma, Tennessee. Dormitory housing and meals were provided to employees attending the training at the facility. Employees, however, were not required to use the lodging provided at the academy and could commute back and forth from their personal residences each day to attend the training, as long as they arrived by 7:00 a.m. Mr. Harris, who lived in Murfreesboro, Tennessee, elected not to stay at the academy and to travel back and forth each day to and from the training in Tullahoma.

TDOC employees attending training were provided with transportation from their sending institution to the academy at the beginning of a session and back to their institution at the end. Employees who chose to commute to the sessions were not compensated for mileage or for the use of their cars. Participation in the mandatory training was considered to be part of their regular work duties and employees received their regular pay, plus three hours of overtime pay as compensation for the travel time from Nashville to Tullahoma at the start of training and from Tullahoma to Nashville at the conclusion of training.

## DISCUSSION

### I. Claims Commission Jurisdiction

The Claims Commission's jurisdiction over this action is set forth in Tenn. Code Ann. § 9-8-307(a)(1)(A), which states:

The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:

\* \* \*

(A) The negligent operation or maintenance of any motor vehicle or any other land, air, or sea conveyance. In addition, the state may be held liable pursuant to this subdivision for the negligent operation of state-owned motor vehicles or other conveyances by persons who are not state employees; provided, that such persons operated the vehicle or other conveyance with the permission of a state employee[.]

### II. Summary Judgment

Both parties have moved for summary judgment. When a motion for summary judgment is made, the moving party has the burden of showing through "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" ... "that there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).

If the moving party's motion is properly supported, "[t]he burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008)(citing *Byrd*, 847 S.W.2d at 215). In order to shift the burden of production, "[i]t is not enough for the moving party to challenge the nonmoving party to 'put up or shut up' or even to cast doubt on a party's ability to prove an element at trial." *Id.* at 8.

A moving party who will bear the burden of proof at trial shifts the burden of production with respect to an element of its claim by offering undisputed facts that show the existence of that element and entitle it to summary judgment as a matter of law. *Hannan v. Alltel Publishing Co.* 270 S.W.3d 9 n. 6. A moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial, however,

must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publishing Co.* 270 S.W.3d 1, 9 (Tenn. 2008).

### III. Scope of Employment

The Tennessee Supreme Court has recognized that the legislative purpose and intent of Tenn. Code Ann. § 9-8-307 is to protect state employees from individual liability for acts or omissions that occur in the scope of their employment. *Johnson v. LeBonheur Children's Medical Center* 74 S.W.3d 338, 343 (Tenn. 2002); see Tenn. Code Ann. § 9-8-307(h) ("State officers and employees are absolutely immune from liability for acts or omissions within the scope of the officer's or employee's office or employment, except for willful, malicious or criminal acts or omissions or for acts or omissions done for personal gain."). The corollary to this statement is that the Claims Commission Act imposes no liability upon the State for acts of its employees occurring outside the scope of their

employment. This determination is made according to the principles of respondeat superior.

In Tennessee, "[a]n employer is liable for the negligent acts of an employee if the employee is on the employer's business and acting within the scope of his employment at the time the negligent act occurs." *Craig v. Gentry*, 792 S.W.2d 77, 79 (Tenn.Ct.App.1990)(citation omitted); *see also Thurmon v. Sellers*, 62 S.W.3d 145, 152 (Tenn.Ct.App. 2001); *Tennessee Farmers Mut. Ins. Co. v. American Mut. Liability Ins. Co.*, 840 S.W.2d 933, 937 (Tenn.Ct.App.1992). For liability to attach to the employer, the plaintiff must show that "(1) the person who caused the injury was an employee, (2) the employee was working on the employer's business at the time of the accident, and (3) the employee was acting within the scope of his employment when the injury occurred." *Id.*

Both parties have moved for summary judgment as to the issue of whether Mr. Harris was acting in the scope of his employment at the time of the accident. It is undisputed that at the time of the accident, Mr. Harris had left his home to report to the fourth day of a training program that he had been required by his employer to attend. Claimant argues that

because Mr. Harris's attendance at the training session was mandatory, "the means, circumstances and times are not factually relevant, and the [State] is legally obligated, by *respondeat superior*, for the employee's status in trips directly to and from the required training."

To determine whether an employee's conduct is within the scope of his employment, Tennessee courts have looked to the Restatement (Second) of Agency § 228 (1957), which states:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master; and

(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency § 228. Additionally, the Restatement

(Second) of Agency § 229 provides:

(1) To be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) whether or not the act is one commonly done by such servants;

(b) the time, place and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

Restatement (Second) of Agency § 229.

Generally, an employee on his way to and from his work and his home and not engaged in any duty connected with his employment is not acting within the scope of his employment. *Prince v. Creel*, 358 F.Supp. 234, 238 (D.C.Tenn. 1972); *see also* Christopher Vaeth, Annotation, Employer's Liability for Negligence of Employee in Driving His or Her Own Automobile, 27 A.L.R.5th 174 (1995 ). However, when an employee's job requires travel, an employer may be vicariously liable for the employee's negligence during that travel under certain circumstances. In order to impose liability under respondeat superior, it is necessary to show that the operator of a vehicle causing injury was, at the time of the accident, acting as a servant or employee of the owner, was engaged in the employer's business, and was acting within the scope of his employment. *Tennessee Farmers Mut. Ins. Co. v. American Mut. Liab. Ins. Co.*, 840 S.W.2d at 938.

If the employee's duties created a necessity for travel, then the employee is within the scope of employment while traveling, as long as the employee does not deviate from the employer's

business and engage in conduct the employer had no reason to expect. If, however, the employee's work played no part in creating the reason for travel and was only incidental to the trip, then the trip was not within the scope of employment. *Cunningham v. Union Chevrolet Co.*, 177 Tenn. 214, 220, 147 S.W.2d 746, 748 (1941); *Bowers v. Potts*, 617 S.W.2d 149, 156 (Tenn.Ct.App.1981); *Pratt v. Duck*, 28 Tenn.App. 502, 512-13, 191 S.W.2d 562, 566-67 (1945). Travel that serves a dual purpose, the employer's and the employee's or a third person's, will still be considered to be within the scope of employment. *Leeper Hardware Co. v. Kirk*, 58 Tenn.App. at 557, 434 S.W.2d at 624; Restatement (Second) of Agency § 236 (1957).

*Tennessee Farmers Mut. Ins. Co. v. American Mut. Liability Ins. Co.*, 840

S.W.2d 933, 938. In *Leeper Hardware Co. v. Kirk*, 58 Tenn.App. 549, 558, 434

S.W.2d 620, 624 (Tenn.App. 1968), the Court articulated that test as

follows:

If the work of the employer creates the necessity for travel, (the employee) is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work is merely incidental to the travel, and the trip would not have been made but for the private purpose of the servant, he is out of the scope of his employment in making it.

*Leeper Hardware Co. v. Kirk*, 58 Tenn.App. 549, 558, 434 S.W.2d 620,

624 (Tenn.App. 1968). As to the manner in which such a determination is

to be made, the *Leeper* Court also noted:

No hard and fast rule can be laid down by which it would be possible to determine in every instance whether the driver of a motor vehicle, in the general employ of another, was acting within the scope of his employment at a given time, but rather each case is to be decided largely upon its own facts, merely keeping in mind the basic idea that the use of the vehicle at the time must have been in the service of the employer, or while about his business.

*Leeper Hardware Co. v. Kirk*, 58 Tenn.App. 549, 556, 434 S.W.2d 620, 624.

It is also clear that an employee who would otherwise be in the course of his employment may step aside from the employer's service, suspending the master servant relationship. In *Bowers v. Potts*, 617 S.W.2d 149 (Tenn. App. 1981), the Court explained:

If an employee who is supposed to perform certain work for his employer steps or turns aside from his employer's work or business to serve some purpose of his own, unconnected with the employer's business, or if he deviates or departs from his work to accomplish some purpose of his own that is unconnected with his employment, the relationship of employer and employee or master and servant is thereby temporarily suspended. The master or employer is not liable for the acts of the servant or employee during the period of such suspension, because the employee is then acting upon his own volition, obeying his own will, not as a servant or agent, but as an independent person, even though he may intend and does return to his employer's business after he has accomplished the purpose of his detour from duty. In other words, where a servant or employee deviates from his line of duty and engages in a mission of his own, or from some third person, the master or employer

cannot be held liable or responsible for the acts of the servant or employee. [Citations omitted.]

*Id.* at 156.

It is not disputed that Mr. Harris was an employee of the TDOC and that he was required to attend the four day training session in Tullahoma. The parties also agree that received his regular salary for attending the training and was compensated for the three additional hours it took to travel once to the academy and once back. It is also not disputed that the TDOC provided employees required to attend the transportation to and from the academy and with meals and housing during the training.

Employees were not, however, required to remain at the academy during the course of the training and could choose to commute back and forth from their homes, or presumably any place else, so long as they were present when the training began at 7:00 a.m. No additional pay, mileage, or other compensation, however, was provided in connection with these interim trips. Mr. Harris elected not to stay in the housing provided and to commute back and forth to the training from his home. It was on one of these trips that the accident took place.

Claimant contends defendant may be liable for the accident because Mr. Harris was required to attend the training session and because his employer had given him the option of staying in a dorm or traveling to and from his home daily in his personal vehicle. In order to hold an employer responsible for the acts of an employee, however,

... it is necessary to show that the relationship of master and servant exists between the wrongdoer and the defendant (employer) *at the time and in respect to the very transaction out of which the injury arose*. The mere fact that the driver of the vehicle causing the injury was the defendant's servant will not make the defendant liable. It must be further shown that at the time of the accident the driver was on the master's business and acted within the scope of his employment.

*Leeper Hardware Co. v. Kirk*, 58 Tenn.App. 549, 555-556, 434 S.W.2d 620, 623 (emphasis added).

In making this argument, claimant relies upon a number of workers' compensation cases applying the so called "going and coming rule" and its exceptions. The Commission does not find the Workers' Compensation cases cited by claimant to be dispositive of the issue of an employer's liability to a third-party under the doctrine of respondeat superior. As one Court has explained:

[W]hile perhaps ninety percent of the decisions on the course of employment in routine cases are interchangeable between the two fields [of workers' compensation and respondeat superior liability], the analogy breaks down in certain close cases because of a fundamental difference between the two types of liability. In the law of respondeat superior, the harmful force is always an act of the servant, or at least the omission which is the equivalent of an act. The inquiry is whether performance of the act was in furtherance of the master's business. But in many workers' compensation situations, the harmful force is not the employee's act, but something acting upon the employee. 1 Larson, *supra*, § 14.00 at 4-1 (1998).

Put another way, the scope of employment may be treated differently because the policy considerations for imposing liability on employers, as a matter of social duty, differ. As a result, "there may be situations where it may be proper to hold an employer liable for compensation benefits to the employee and yet not hold the employer responsible for that employee's conduct in causing injury to a third person arising out of the same situation." See *Liberty Mutual Insurance Co. v. Electronic Systems, Inc.*, *supra*, 813 F.Supp. at 806.

*Pham v. OSP Consultants, Inc.* 992 P.2d 657, 660 (Colo.App. 1999).

Similarly, in *Courtless v. Jolliffe*, 203 W.Va. 258, 263, 507 S.E.2d 136,

141 (W.Va. 1998), the West Virginia Supreme Court recognized:

Commentators have cautioned against unbridled application of the same "going and coming" principles to workers compensation cases and tort matters. "Workers' compensation law takes a different approach to exceptions to the going-and-coming rule.... [W]orkers' compensation cases are not controlling with respect to exceptions to the going-and-

coming rule in cases involving respondeat superior....

Workers' compensation and respondeat superior law are driven in opposite directions based on differing policy considerations. Workers' compensation has been defined as a type of social insurance designed to protect employees from occupational hazards, while respondeat superior imputes liability to an employer based on an employee's fault because of the special relationship.... Further, courts heed statutory admonitions for a liberal construction favoring coverage in workers' compensation cases which are not present in respondeat superior law.

*Courtless v. Jolliffe*, 203 W.Va. 258, 263, 507 S.E.2d 136, 141 (W.Va. 1998)

*citing Blackman v. Great American First Savings Bank*, 233 Cal.App.3d 598,

604-605, 284 Cal.Rptr. 491 (1991)(citations omitted). Finally, the Supreme

Judicial Court of Maine has noted:

Although it is tempting to import precedent from workers' compensation cases into discussions of tort liability, that temptation must be resisted. Like many other courts, we have addressed the related, but distinct, issue of when an injury incurred by an employee driving to or from work "arises out of" and is "in the course of" employment for workers' compensation purposes. *See Fournier v. Aetna, Inc.*, 2006 ME 71, ¶ 6, 899 A.2d 787, 789 (acknowledging the "well-established workers' compensation principle" known as the "going and coming rule"); *see also Boyce v. Potter*, 642 A.2d 1342, 1343 (Me.1994); *Westberry v. Town of Cape Elizabeth*, 492 A.2d 888, 890 (Me.1985); *Waycott v. Beneficial Corp.*, 400 A.2d 392, 394 (Me.1979); *Oliver v. Wyandotte Indus. Corp.*, 308 A.2d 860, 861 (Me.1973). These precedents are not controlling here. As several courts have recognized, it is inappropriate to uncritically import the reasoning of workers' compensation

cases into issues of vicarious tort liability. *See, e.g., Ahlstrom v. Salt Lake City Corp.*, 73 P.3d 315, 317 & n. 1 (Utah 2003); *Clickner v. City of Lowell*, 422 Mass. 539, 663 N.E.2d 852, 855 n. 4 (1996); *Luth v. Rogers & Babler Constr. Co.*, 507 P.2d 761, 764 (Alaska 1973). The workers' compensation standard of arising out of and in the course of employment is generally broader than the tort standard of scope of employment, because the two standards serve different purposes and effectuate different policies. *See Harless v. Nash*, 959 P.2d 27, 29 (Okla.Civ.Ct.App.1998); *Jones v. Aldrich Co.*, 188 Ga.App. 581, 373 S.E.2d 649, 651 (1988); *Flanders v. Hoy*, 230 Pa.Super. 322, 326 A.2d 492, 494 n. 4 (1974); *Lundberg v. State*, 25 N.Y.2d 467, 306 N.Y.S.2d 947, 255 N.E.2d 177, 180 (1969).

*Spencer v. V.I.P., Inc.* 910 A.2d 366, 371 (Me. 2006). The most compelling reason, however, for not using workers' compensation cases to construe the scope of employment requirement in respondeat superior cases is the fact that Tennessee appellate courts do not appear to have done so.

Even assuming, however, that consideration of the workers' compensation authority cited by claimant was appropriate in this case, it is not clear that those cases would warrant the outcome argued for by claimant. Although the cases cited involved travel that was determined to have been in the scope of the employee's duty for workers' compensation purposes, the circumstances are distinguishable in that the employees

appear to have been engaged in travel that was both necessary to their employment and required by the employer at the time of their injuries.

In the instant case, however, although attendance at the training was required, the travel in which Mr. Harris was engaged at the time of the accident was not. To the extent to which any travel may have been necessary to attend the training session, it did not include Mr. Harris's daily trips to and from his home as a result of his decision not to stay in the dorm.

Nor can the Commission conclude that the fact that employees were given the choice of boarding at the academy or of commuting to their homes makes a difference to this determination. In order to bring travel within the scope of employment it must serve some purpose that is beneficial to the employer. The fact that room and board was provided by the TDOC weighs against any finding that his commute served such a benefit.

The TDOC did not require that he use his vehicle to leave the academy after the training had concluded for the day and commute back the following morning and did not exercise any control over the manner in

which the trips were made. Mr. Harris was compensated neither for that use nor for the time that it took to make those trips. Mr. Harris cannot be said to have been “on the job” at the time of the accident and there is no proof that he was engaged in any special errand connected to his work at the time of the accident.

The undisputed facts show that these interim trips to and from his home were not necessitated by his work and that they accomplished no business purpose of his employer. Rather, they appear to have been solely a benefit to Mr. Harris, as opposed to a requirement of the job. The Commission concludes that the purpose of these trips was to satisfy Mr. Harris’s private purpose of returning home everyday. In this respect, these trips were no different from his commute to work in Nashville from Murfreesboro every day.

Whether an employee is acting within the scope of his or her employment is generally a question of fact. *Craig v. Gentry*, 792 S.W.2d 77, 80 (Tenn.Ct.App. 1990). It becomes a question of law, however, when the facts are undisputed and cannot support conflicting conclusions. *Tennessee Farmers Mut. Ins. Co. v. Am. Mut. Liab. Ins. Co.*, 840 S.W.2d 933, 937. Based

on the undisputed material facts, the Commission concludes that there is no genuine issue for trial with respect to whether Mr. Harris was acting in the scope of his employment at the time of the accident. Therefore, summary judgment is entered for the defendant. As this issue is dispositive of this matter, the resolution of any remaining issues is pretermitted.

It is so **ORDERED** this the 15<sup>th</sup> day of October, 2009.

A handwritten signature in black ink, appearing to read 'S. R. Reeves', is written over a horizontal line.

STEPHANIE R. REEVERS  
Claims Commissioner

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 15<sup>th</sup> day of October, 2009.

  
Marsha Richeson, Administrative Clerk  
Tennessee Claims Commission